Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

RICHARD A. MOECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Wisconsin Supreme Court contravene *Arizona v. Washington*, 434 U.S. 497 (1978), when it held that the Double Jeopardy Clause prohibits the retrial of a defendant whose prior trial ended in a mistrial declared, over his objection, in response to an improper opening statement by defense counsel?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL PROVISION INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THE WISCONSIN SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ARIZONA V. WASHINGTON.* 9

II. FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS ARE DIVIDED OVER WHAT, IF ANY, DEFERENCE IS OWED TO A TRIAL COURT'S DETERMINATION THAT CONDUCT BY THE DEFENSE CREATED A MANIFEST NECESSITY FOR DECLARATION OF A MISTRIAL. 14

III. THIS CASE INVOLVES A RECURRING ISSUE OF NATIONAL IMPORTANCE. 21

CONCLUSION 27

Page

TABLE OF AUTHORITIES

Cases Cited

Anderson v. City of Bessemer City,
470 U.S. 564 (1985).....12

Arizona v. Washington,
434 U.S. 497 (1978).....2, 3, 9-13, 17-23, 26

Bailes v. Jolliffe,
541 S.E.2d 571 (W.Va. 2000).....17

Barrow v. Uchtman,
398 F.3d 597 (7th Cir. 2005) 25, 26

Brady v. Samaha,
667 F.2d 224 (1st Cir. 1981).....14

Commonwealth v. Murray,
496 N.E.2d 179 (Mass. App. Ct. 1986) 17

Commonwealth v. Rivera,
715 A.2d 1136 (Pa. Super. Ct. 1998).....16

Douglas v. United States,
488 A.2d 121 (D.C. 1985) 16, 21

Fong Foo v. United States,
369 U.S. 141 (1962).....21

Gilliam v. Foster,
75 F.3d 881 (4th Cir.),
cert. denied, 517 U.S. 1220 (1996).....13, 14, 18, 20

Griffin v. California,
380 U.S. 609 (1965).....6, 25

Page

Grimes v. McAnulty,
957 S.W.2d 223 (Ky. 1997),
cert. denied, 525 U.S. 824 (1998) 17, 18

Illinois v. Somerville,
410 U.S. 458 (1973).....9

In re Minnis,
29 P.3d 462 (Kan. Ct. App. 2001) 16

In re S.G., Jr.,
935 S.W.2d 919 (Texas Ct. App. 1996).....17

Jackson v. State,
855 So. 2d 178
(Fla. Dist. Ct. App. 2003) 16, 18

Johnson v. Karnes,
198 F.3d 589 (6th Cir. 1999) 14-15, 17, 19, 21

Lockett v. Ohio,
438 U.S. 586 (1978).....25

Lovett v. Commonwealth,
472 N.E.2d 236 (Mass. 1984) 17, 18

National Hockey League v. Metropolitan Hockey Club, Inc.,
427 U.S. 639 (1976).....12

People v. Dahlberg,
823 N.E.2d 649 (Ill. App. Ct. 2005) 16

People v. Largent,
786 N.E.2d 1102 (Ill. App. Ct. 2003) 16

Page

Pleas v. State,
495 S.E.2d 4 (Ga. 1998).....17

Quinones v. State,
766 So. 2d 1165
(Fla. Dist. Ct. App. 2000).....23

Rodriguez v. State,
719 So. 2d 1215
(Fla. Dist. Ct. App. 1998).....16

Ross v. Petro,
No. 5:04CV849, 2005 WL 1126758
(N.D. Ohio May 3, 2005).....15

Spaziano v. State,
429 So. 2d 1344
(Fla. Dist. Ct. App. 1983).....16, 19

State v. Bayse,
859 P.2d 542 (Or. Ct. App. 1993).....17

State v. Colvin,
No. 04AP-421, 2005 WL 704818
(Ohio Ct. App. March 29, 2005).....17

State v. Gould,
743 A.2d 300 (N.H. 1999).....16

State v. Levison,
510 N.W.2d 495 (Neb. Ct. App. 1993).....17, 18

State v. Seefeldt,
2003 WI 47, 261 Wis. 2d 383,
661 N.W.2d 822.....7, 12

Page

State v. Sheets,
No. 22926-2-III, 2005 WL 1432503
(Wash. Ct. App. June 21, 2005).....16, 21

Strickland v. Washington,
466 U.S. 668 (1984).....26

Testa v. Village of Mundelein, Ill.,
89 F.3d 443 (7th Cir. 1996) 15

Tubbs v. State,
583 S.E.2d 853 (Ga. 2003).....17, 18

United States v. Berroa,
374 F.3d 1053 (11th Cir. 2004) 15

United States v. Chica,
14 F.3d 1527 (11th Cir. 1994) 15

United States v. Combs,
222 F.3d 353 (7th Cir. 2000) 15, 25, 26

United States v. Dinitz,
424 U.S. 600 (1976)..... 9, 24

United States v. Gomez,
120 Fed. Appx. 930, 2005 WL 271459
(3d Cir. Feb. 4, 2005).....25

United States v. Mastrangelo,
662 F.2d 946 (2d Cir. 1981).....15

United States v. Melius,
123 F.3d 1134 (8th Cir. 1997) 15

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824).....2

Page

United States v. Rivera,
384 F.3d 49 (3d Cir. 2004).....14, 20

United States v. Robinson,
485 U.S. 25 (1988).....25

United States v. Sammaripa,
55 F.3d 433 (9th Cir. 1995) 15

United States v. Sloan,
36 F.3d 386 (4th Cir. 1994) 14, 18, 19, 20

United States v. Toribio-Lugo,
376 F.3d 33 (1st Cir. 2004).....14

United States ex rel. Hampton v. Leibach,
347 F.3d 219 (7th Cir. 2003) 25

Statute Cited

28 U.S.C. § 1257(a) 2

Constitutional Provisions Cited

United States Constitution

Fifth Amendment..... 2, 13, 25, 26

Sixth Amendment 26

Other Authority Cited

5 Wayne R. LaFave,
Criminal Procedure (2d ed. 1999)..... 23

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is set forth in the Appendix (A1-62) and is reported at 695 N.W.2d 783. The opinion of the Wisconsin Court of Appeals is set forth in the Appendix (A63-74) and is reported at 677 N.W.2d 648.

The trial court's oral decision declaring a mistrial is set forth in the Appendix (A85-92). The trial court's written decision denying respondent's motion to dismiss on double jeopardy grounds is set forth in the Appendix (A93-96).

JURISDICTION OF THIS COURT

The State of Wisconsin seeks review of a final decision of the Wisconsin Supreme Court, rendered May 6, 2005. This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

INTRODUCTION

In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court addressed a recurring problem facing trial judges: how to remedy an improper opening statement by defense counsel in a criminal case. The Court had long held that the Double Jeopardy Clause does not bar a retrial following a mistrial founded upon "manifest necessity." *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). But what is a trial judge to do if he or she believes that no instruction to the jury can cure the improper opening statement, yet fears declaring a mistrial because an appellate court may disagree that the improper statement made mistrial a "manifest necessity"? If that occurred, the Double Jeopardy Clause would bar a retrial and the defendant would walk free thanks to his own counsel's misconduct.

The Court solved this problem in *Arizona v. Washington*, where it held that "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference." *Id.* at 514. Such deference is warranted by "compelling institutional

considerations," most notably that "he is far more conversant with the factors relevant to the determination than any reviewing court can possibly be." *Id.* at 513, 514 (internal quotation marks and citation omitted). This holds especially true, stated the Court, where the error prompting the mistrial was an improper opening statement by defense counsel. A trial judge's determination that a mistrial is warranted based on such conduct "is entitled to special respect." *Id.* at 510.

The Wisconsin Supreme Court, in the decision below, blatantly disregarded this Court's instruction. Instead, it held that the Double Jeopardy Clause barred the retrial of a defendant whose prior trial ended in a mistrial because his counsel presented the defendant's entire account of events in his opening statement, but then failed to offer *any* evidence to back up that account. (Counsel mistakenly assumed that the defendant would testify.) Far from giving the trial court "great deference" or "special respect," the Wisconsin Supreme Court reversed based on its own independent belief that a curative instruction and the State's closing argument could have remedied defense counsel's enormous error.

Unfortunately, the Wisconsin Supreme Court is not the only court that is failing to grant trial judges the deference required by *Arizona v. Washington*. Numerous federal and state courts have given little or no deference to trial judges' declarations of mistrial. This Court should grant certiorari to preserve the discretion it has granted trial courts and to prevent criminal defendants from escaping any punishment for their actions based on their own counsels' errors.

STATEMENT OF THE CASE

The State of Wisconsin charged Richard Moeck with various offenses arising out of an encounter between himself and the victim, Chris Sader, at Moeck's apartment in the early

morning hours of August 2, 1997. The victim testified that Moeck repeatedly assaulted him physically and sexually, and robbed him, during the several hour ordeal.

Moeck's first trial ended in a deadlocked jury and a mistrial was declared. Moeck did not challenge that mistrial declaration. Moeck and the victim both testified and were cross-examined. App. A3, ¶7.

Moeck's second trial ended in a jury's guilty verdict and conviction on all counts. Moeck and the victim again both testified and were cross-examined. Moeck's conviction, however, was reversed by the Wisconsin Court of Appeals. The court of appeals held the trial judge committed reversible error when he inadvertently referred during *voir dire* to the fact that Moeck was charged as a repeat offender. Although the judge immediately gave a curative instruction, the court of appeals held that he should have declared a mistrial instead. App. A3, ¶8.

Moeck's third trial ended in the mistrial declaration upon which the present controversy is based. App. A3, ¶9. The State's request for a mistrial, and the trial court's order, resulted from defense counsel's opening statement to the jury. In his opening statement, defense counsel summarized in detail his client's anticipated exculpatory testimony and corresponding attack on the victim's credibility and character. Counsel also referred liberally to his client's testimony in the two previous jury trials. *See* App. A75-A85.[1]

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[1] The key passage is as follows:

> On this morning, ladies and gentlemen, what happened, Rich [Moeck] is asleep in his apartment. [C.S.] [the victim] knocks on the door. . . . [C.S.] comes to Rich's apartment with marijuana looking to sell marijuana that night to Rich. He also asks if he can crash at his place

(footnote continued)